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Legal Problems of the Forensic Odontologist

With the growing demand for competent forensic odontologists and the corresponding growth of interest in the field, it becomes of utmost importance for us to be aware of the legal problems involved in this area. In conjunction with the rapid growth in this field, there are more people working on more cases and, therefore, more changes of litigation and a need for the understanding of laws that govern this specialty.

For example, there is a rapid increase in the number of forensic odontologists that serve as consultants to Medical Examiner and Coroner Offices. These positions, even in some of the more progressive offices in this country, were practically unheard of in the early 1960's. Today, however, there is the growing realization that the staffs of these offices are incomplete without a forensic odontologist as a consultant.

Another reason for the rapid growth of interest, bringing with it more need for legal knowledge, is the number of forensic medical and dental organizations that have developed in the last few years. For instance, there is the Odontology Section of the American Academy of Forensic Sciences that was established in 1971. The American Society of Forensic Odontology has been in existence for 3 years, with a membership of 180 from 29 states and 4 foreign countries. This organization is experiencing a very rapid growth in membership. There are many applications to the annual Forensic Dentistry meeting that is held at the Armed Forces Institute of Pathology. Last year, for instance, there were 96 persons in attendance, that included the medical, dental, legal, anthropological, and law enforcement professions.

Furthermore, there are informal meetings held, such as Dr. Lester Luntz's group in Connecticut along with the disaster squad that he recently organized. These people were extremely efficient in the identification of the victims in the Allegheny plane crash on June 7, 1971 in New Haven.

Dr. Lowell Levine organized a one-day meeting in New York City in March 1971. There were approximately 400 persons from various professions in attendance. There is also an annual meeting at U.S. Coast Guard Base, New York. In addition to many outside participants, the Coast Guard divisions in attendance are legal, medical, dental, intelligence, and security.

Therefore, we can plainly see the importance of legal knowledge in this field in order that we know the legal rights and limitations, to be aware of questionable cases and situations that arise, and to realize the limitations in gaining, handling, and evaluating dental evidence.

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General Legal Issues Involving the Forensic Odontologist

Among the legal problems we face is the basic one of authorization. When a person is deceased, it is important to remember that the property right concerning the handling and disposition of the remains is passed on to the next of kin. Therefore, an independent request for the dental examination from an insurance company, for example, should be viewed with caution by the forensic odontologist. He should be certain that the next of kin approve this examination and that the authorities, such as law enforcement officers, the Medical Examiner's or the Coroner's office have the necessary right to utilize him.

Obviously, in most instances, there would be no defined property right in a corpse where there has been no identification. In such cases, the forensic odontologist may assist any authorized persons to proceed with the identification procedures. However, it is important to remember that a dissection made at the request of an insurance carrier, without written permission from the next of kin, renders one liable along with the carrier and those assisting this illegal procedure.²

Ordinarily the forensic odontologist is not covered by dental liability insurance; however, this is not important when his work is authorized by the summoning authority, such as a Medical Examiner's office. In such a case, the organization would be responsible. This is based on the master-servant relationship; and generally, the master is responsible for the servants actions in the line of duty.

The chances of an organization being sued are practically non-existent. However, if sued, the grounds would probably be that of assault on a dead body, which is considered a minor one. Probably the most damages incurred would be that of funeral expenses. Furthermore, if sued, it must be shown by the plaintiff that there were no legal implications or reasons for making the dissection; or, it must be shown that the case was not one for the Medical Examiner or Coroner in the first place. So for all practical purposes, one need not be concerned about being sued when he is authorized in writing.

Making an identification is a serious business. Among the legal problems that may be pending are the settlement of estates, insurance awards, ascertainment that no foul play was present, and the concern of remarriage of survivors and possible bigamy charges. Quite often these problems cannot be resolved unless the unknown is positively identified. In some instances, there may be a waiting period of 7 to 10 years until the unknown is declared legally dead.

Frequently, the question is raised concerning the legal consequences of the forensic odontologist making a false identification. In this situation, the dentist would not be held liable for charges brought against him. The reason is that he was asked to give his professional opinion, which he did, but there is no legal requirement that this opinion be correct.

Also there is the question of whether or not the dentist is considered to be practicing without a license when he is licensed in one state and crosses into another to assist in forensic work. This situation presents no legal problem because it would not be considered in the realm of practicing dentistry. For example, it is not unusual for a dentist to testify in the capacity of an expert witness in any state, regardless of his state licensure.

The question occasionally arises as to whether the authorities must get permission from a practicing dentist to duplicate his records. This is not necessary since the original records are subpoenaed and stay with the case until terminated. The point would be held that the office would have the dentist's implied consent to reproduce these if necessary.

Another problem arises, however, in situations where the dentist refuses to turn over his records to proper authorities. This is solved in many places by exercising the subpoena

² Streip vs. Liberty Mutual Insurance Co., Kentucky, 1932.

power possessed by the Medical Examiner's office. Therefore, the office directly subpoenas the dentist, not only to turn over the records needed, but to turn over all of his records to the court. Of course, if he fails to conform to this order, he would be held in contempt of court. This procedure is usually successful, since one can imagine the confusion created in the dentist's office, not to mention the expense through time lost from work, plus the cost of legal counsel.

The Dentist and the Bite Mark Analysis

Another legal ramification that should be familiar to all forensic odontologists concerns the taking of dental impressions of a suspect in a bite mark case. Ideally, one should obtain informed written consent from the suspect stating what he would like to do, why it is being done, and how the results will be utilized.

If the suspect refuses, it is believed that the best procedure to follow is not to force the issue, but to let the counsel for the defense and the authorities settle the matter. The reason for not proceeding is that you may be open for an assault suit if the evidence is obtained by force.

A procedure that has been successfully followed in these situations consists of the forensic odontologist taking dental impressions of the other suspects and going into court with the study models. A court order is then obtained, compelling the suspect to submit to this procedure. Generally, this method of obtaining the evidence would not be considered self incriminating.

Recently, however, there has been some legal progress made concerning this subject. One of the most recent decisions concerning the use of dental evidence occurred in the pretrial proceedings in the Rice case in the state of Connecticut.

The issue, aside from the question of consent, was whether the taking of dental impressions is a violation of a defendant's rights or specifically, whether the state committed a substantial intrusion into the body of the accused and, therefore, violated any of his constitutional rights.

In this case, the forensic odontologist had been authorized by the State's Chief Medical Examiner to examine the body of the victim for bite marks. Upon examination, he found bite marks on the victim's left breast. Several days later, the forensic odontologist received permission from the accused and his father and proceeded to take dental impressions and photographs. Unknown to the forensic odontologist was the fact that the counsel for the accused had previously refused permission to have any dental impressions taken. It was revealed in the pretrial hearings that permission was refused on grounds of "self-incrimination and a violation of the defendant's constitutional rights." On the other hand, the police indicated that he had the right to take them as he had the right to take finger prints.

At this time the dentist answered questions concerning his qualifications as a forensic odontologist to perform these tests. After qualifying, he stated that the victim had been bitten. However, he was not asked the implication of his findings.

The defense then made the motion that the state be barred from introducing the dental evidence and the Superior Court judge reserved a decision and requested a filing of briefs on the defense claim of self incrimination and violation of constitutional rights.

After reviewing the briefs, the Superior Court judge denied the motion, finding that "the defendant voluntarily submitted following his arrest, while represented by counsel and having been given the necessary legal warning." The judge stated that the U.S. Supreme Court concluded that the constitution does not forbid the State's minor intrusions into one's body under stringently limited conditions. This implies that consent is not necessary when these tests (dental impressions) are conducted properly.

This ruling allowed the State to introduce the dental evidence which had great significance in the trial and will probably influence cases of this nature in the future.

The Dentist and the Drug Addict³

This topic focuses upon a common problem affecting most of the states of our nation. Drug abuse is increasing by unbelievable proportions all over the world, and the dentist must realize the legal implications placed upon him in the recognition and handling of these cases.

A common dental finding in the drug addict is generalized breakdown of the oral structures. Frequently, there is periodontal breakdown due to heavy calculus (tartar) formation; and there are usually large carious lesions present, probably due to diet and gross neglect. Often seen in the older addict are retained root tips, extensive bone loss that accompanies the periodontal destruction, and extremely extensive carious lesions that would be pain producing to the normal individual.

A theory regarding the etiology of the extensive dental caries in the addict is based upon the transient phases of hypoglycemia, often noted, which leads to a physiologic craving for sugar. The oral cavity is thus exposed to carbohydrates and their by-products for long periods of time. The excessive sugar consumption results in extensive decay. These carious lesions ordinarily would result in great discomfort; however, the addict, with a raised pain threshold related to his habit, fails to seek attention for his rapidly progressing dental problems. This condition is further worsened by a 'don't care' attitude and a lack of finances for obtaining proper oral treatment due to their expensive habit that must be satisfied.

The dentist should also recognize other features that aid in the recognition of the addict, such as the presence of 'pop marks' on the legs (these are commonly seen in the female due to the small veins in the arms) or needle tracts which are frequently found on the arms.

Systemic diseases most commonly seen in the addict are hepatitis, malaria, tetanus, syphilis, and gonorrhoea. It is extremely important that the dentist has legal knowledge concerning these conditions, since many states have effective laws that attempt to control drug abuse. For instance, in New York, Section 206 of the Mental Hygiene Law permits any person to go into the lowest court and fill out a petition stating that another is a suspected addict. The person named is examined by a physician appointed by the court. The suspect may also bring in his own physician and lawyer and may request a jury trial. If found guilty of addiction by the court, he may be committed up to 36 months in confinement.

Therefore, it is obvious that the law makes it easy for the dentist to report a suspected addict, and, it is very important for him to do so because of both a moral and legal duty. In many situations, the dentist may be saving the life of the addict, protecting himself, his family, his auxiliary personnel, and other innocent people.

The Dentist and the "Battered Child"³

The problems involving abused children are rapidly increasing and are legally becoming quite important to the forensic odontologist. There are many legal implications that affect the dentist in cases of this nature.

The oral manifestations of the "battered child syndrome" consist of fractures, particularly old, untreated fractures that show up as malpositioned bone fragments or large

³ The following information is from the Office of the Chief Medical Examiner, New York City.

callus formations. Another very common finding is discolored anterior teeth which are often indicative of an old injury. Lacerations of the lip with torn labial frenum attachments are also a frequent finding. Naturally, bruises are often present due to falls, blunt instruments, and fists of the perpetrator. Fistulae tracts, indicative of chronic infection related to trauma are frequently seen. It is quite possible that the dentist could have seen this entity some time prior to death. Also, bite marks are not an unusual finding on the abused child. It is believed that these occur more frequently than has been realized in the past since authorities such as Coroners, Medical Examiners, and law enforcement officers are currently more aware of this entity.

The dentist must be fully aware of the proper legal approach in handling such observations. Dentists have a legal obligation to report suspicions regarding the abused child in half of the states of our nation. These states have written statutes that make such a report mandatory for the persons named in the statute. Dentists are required to report in 18 states and Guam. The penalty for knowingly failing to report is a misdemeanor and is considered similar to the act of failing to report a gunshot wound.

At the present time, these various laws differ in form and substance, but they are in agreement in that they contain 13 basic elements which are as follows⁴:

(1) **STATEMENT OF PURPOSE** refers to the subject matter of the specific law. This is often found in a purpose clause where the legislature goes on record with an expression of ultimate goals and objectives it seeks to achieve by the law. Then, they state the mechanism that they intend to set in motion in response to a report of child abuse.

(2) **AGE LIMITS FOR REPORTABLE CHILDREN** is an element where there is considerable variation concerning the upper age limit by the definition used in the age of the child coming within the protection of the reporting law. Ages run from a low of 12 years old in Georgia and Oregon to a high of 21 years of age. There are 18 states and the Virgin Islands that use ages above 16 years old.

(3) **THE DEFINITION OF REPORTABLE ABUSE** is another important basic element required. This element varies in word, but the meaning is substantially the same. For example, they may be worded 'reason to believe,' 'reasonable cause to suspect' or 'have reasonable or just cause to believe'.

(4) **THE NATURE OF REPORT** is another basic element. In 46 states, the District of Columbia, Guam, and the Virgin Islands, the reporting law is mandatory. This means that persons cited in the law **must report** all situations where they know or suspect that a child has been physically abused. There are 4 states, however, that make their law permissive. This means that persons cited in the law 'may' report instead of 'shall' report. Naturally, such phrasing as 'may' tends to weaken the law. The states that have statutes phrased in the latter term are New Mexico, North Carolina, Texas, and the state of Washington.

There are 29 states that have a clause stating the report must be accusatory in nature. This means that the reporting source must identify the perpetrator as persons falling within a class of persons 'responsible for the care of the child'. Examples of this would include parents, guardian, custodian, legal guardian, or stepparent. Naturally, a reporter is more reluctant to report when he is in an accusatory role than when he does not have to identify the perpetrator. Therefore, when the report is accusatory in nature, it tends to discourage reporting.

⁴ From the American Humane Association, Denver, Colorado.

(5) Another basic element is concerned with **WHO REPORTS**. In conjunction with this element, the medical profession is cited in a vast majority of states. Dentists are required to report in 18 states and Guam. It is interesting to note that Nebraska, Tennessee, and Utah do not follow the trend of other states in that they impose responsibility for reporting on any person having knowledge.

(6) **HOW THE REPORT IS MADE** is another basic element. A vast majority of the states require that the report be made by telephone or otherwise. The proper report should contain the following data: the names and addresses of the child and parent, the child's age, the nature and extent of injuries, evidence of prior injury, the identification of the perpetrator, and additional information that might be pertinent.

(7) **TO WHOM THE REPORT IS MADE** is also a basic element. The most commonly cited organization is the Department of Welfare on a county or state level.

(8) **MANDATE TO THE RECEIVING AGENCY** is another basic element. Many statutes state the type of action expected and imposed specific responsibilities on the agency charged with receiving the report. At this time, there are 37 states and Guam that have incorporated specific mandates.

(9) An important basic element of the law is **THE PROVISION WHICH GRANTS IMMUNITY AGAINST CRIMINAL OR CIVIL ACTION TO THOSE REPORTING**. This element is of extreme importance to the forensic odontologist because without such protection, the dentist and physician would be vulnerable to suit due to the doctor-patient relationship. At present, there are 49 states, the District of Columbia, Guam, and the Virgin Islands that have immunity clauses in their law.

(10) **WAIVERS** is another basic element. Due to the doctor-patient relationship, these waivers serve to free the doctor from legal or ethical restrictions. There are 36 states, the District of Columbia, Guam, and the Virgin Islands that have such waivers. There is also the like privilege between husband and wife. Waivers pertaining to this are found in 22 states, the District of Columbia, and the Virgin Islands.

(11) Another basic element is the **PENALTY CLAUSE** which is found in 25 states, Guam, and the Virgin Islands. This Clause makes it a misdemeanor for a person to willfully violate this act.

(12) The **CENTRAL REGISTRY** has been incorporated as a basic element of reporting in 19 states. Its purpose is to gather data on incidence and characteristics to permit studies and use it as a resource for identifying repeated abuses of the same child or in the same family.

(13) The last basic element is **SPECIAL CLAUSES** which are not significant to the forensic odontologist in that they mainly serve to clarify other sections.

When the question arises as to who reports, the principal group is the medical profession. The reasons for this is that they are a responsible and competent group to make a diagnosis of 'injury probably due to other than accidental cause'.

Concerning the subject of to whom the report is made, the overall picture can be narrowed down to two basic concepts. These are that a single agency is named to receive reports because this concentrates responsibility for protection of the abused child; and by naming the Department of Welfare, they are sure of invoking an investigation, diagnosis, and treatment skills of the protective service program.

Everyone in the field of Forensic Odontology should be aware of the current trends in the laws. Some of these include a broadening of the base of those mandated to report,

broadening the definition of abuse to include mental health content, and requiring a direct reporting to the public welfare program. There are waivers that make reporting easier and provide immunity from legal action to those reporting.

Another important trend is that concerning the central registry setup. This permits the identification of repeated abuses of the same child to be computed in one location. This system excludes the possibility of repeated abuses reported at different locations from going unnoticed.

The Dentist and the Chain of Evidence³

A topic that is of utmost legal importance to the forensic odontologist is that of preserving the chain of evidence. The reason for preserving this is to assure that no one tampers, shades, or alters the evidence. Therefore, the shorter the chain, the less possibility there is for such to occur. If this procedure is done incorrectly, it will result in destroying the evidence; and the evidence cannot be used in court.

The proper procedure to follow is for the consulting forensic odontologist to call the dentist of the victim and explain the situation. At the same time he asks that X-rays, casts, charts, and other information be made available. Then an authorized officer, such as a detective, state trooper, or a member of the District Attorneys Office, is sent to the dentist to obtain this evidence. When the evidence is received from the dentist, the official signs an affidavit stating what he has, its description, the time, place, and the date. Then the official brings the evidence to the Medical Examiner's or Coroner's Office where he or one of the authorized staff signs likewise, stating that the evidence is in his custody.

When the forensic odontologist makes his positive identification, he signs an affidavit stating that in his professional opinion it is the suspect. Then the evidence (jaws, X-rays, models, etc.) is kept under lock and key until the case is signed out and terminated by the investigating office.

After termination the evidence that was the property of the dentist is returned in like manner or by first class mail which is considered unbroken chain of evidence in the United States.

Conclusion

This material has included the most important legal problems that the forensic odontologist can be expected to encounter. This article is intended to make the dental profession more aware of the significance of having legal knowledge in this field and of the importance of keeping abreast with the changes that will occur in the future.

³ From the Office of the Chief Medical Examiner, New York City.